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The State of South Carolina



Office of the Attorney General

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July 23, 1987

Timothy E. Meacham, Esquire
Staff Attorney, City of Florence
Drawer AA, City-County Complex
Florence, South Carolina 29501-3456

Dear Mr. Meacham:

By your letter of June 22, 1987, you have asked whether one person may serve simultaneously as a part-time municipal judge and also as a part-time federal magistrate without contravening the dual office holding prohibitions of the State Constitution. We concur with your conclusion that there would be no problem with respect to dual office holding. We further suggest that the Judicial Standards Commission or the Advisory Committee on Standards of Judicial Conduct be consulted to be certain that no provision of the Code of Judicial Conduct would be contravened.

The office of municipal judge (formerly called municipal recorder) is created by Section 14-25-15, Code of Laws of South Carolina (1986 Cum. Supp.), for those municipalities which choose to have a municipal judge. This Office has determined previously that one who serves as a part-time municipal judge would hold an office for dual office holding purposes. Op. Atty. Gen. No. 84-11, dated February 1, 1984.

This Office has apparently not considered whether a federal magistrate would be an office for purposes of dual office holding. As you note in your memorandum, this position is one created by federal law rather than state law. With this in mind, the various prohibitions against dual office holding must be examined to determine their applicability to federal offices or employment.

There are four prohibitions against dual office holding in the State Constitution. The first is found in Article III, Section 24, which states that "[n]o person shall be eligible to

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a seat in the General Assembly while he holds any office or position of profit or trust under this State, the United States of America, or any of them" In the several opinions of this Office which have considered the applicability of Article III, Section 24 to a federal office or employment to be undertaken by a member of the General Assembly, this Office has consistently advised that federal positions (unless strictly advisory) fall within the prohibition. See Ops. Atty. Gen. dated April 16, 1982 (aide to United States congressman on a salaried and non-temporary basis); November 21, 1960 (United States Commissioner); but see an opinion dated April 9, 1976 (advisory council to the Small Business Administration is permissible due to its strictly advisory nature). Because the individual in question is not a member of the General Assembly, this constitutional prohibition does not apply to him.

Similarly, Article V, Section 16 prohibits dual office holding by justices of the Supreme Court and judges of the Court of Appeals and Circuit Court. Because the individual in question serves as a municipal judge rather than in one of the capacities enumerated in the section, this section is not applicable.

The final two prohibitions against dual office holding are found in Article VI, Section 3 and Article XVII, Section 1A of the State Constitution. The provisions of the two sections are identical, stating that "[n]o person shall hold two offices of honor or profit at the same time" Exceptions are noted for members of the militia, notaries public, or delegates to a Constitutional Convention. It is notable that these provisions do not contain language as specific as that of Article III, Section 24, which specifically refers to offices or positions of profit or trust under the United States of America.

In the reasoned opinions which have considered the applicability of Article XVII, Section 1A to federal offices or positions, or Article II, Section 2 as the provision was formerly located, it was held that federal positions or offices did not come within the prohibition of Article XVII, Section 1A or Article II, Section 2, whichever was applicable at the time of the opinion. See Ops. Atty. Gen. dated March 21, 1979 (postmaster); June 8, 1977 (unknown "federal position"); June 11, 1976 (public advisory committee, United States Office of Education); August 24, 1973 (substitute mail carrier); July 20, 1971 (advisory council, Small Business Administration); March 18, 1968 (county Agriculture and Soil Commission); and others. The opinion of November 21, 1960 referred to above relative to the office of United States Commissioner, concluded that under Article II,

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Section 2 (now Article XVII, Section 1A), there would be no dual office holding problem, unlike the result reached in considering Article III, Section 24. 1/.

Based on the foregoing, it is the opinion of this Office that one who would serve simultaneously as a part-time municipal judge and as a part-time federal magistrate would not contravene the dual office holding prohibitions of the State Constitution. As noted in the first paragraph, the appropriate commissions which interpret the Code of Judicial Conduct should be contacted to ensure that no provisions of that Code would be violated.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook
Robert D. Cook
Executive Assistant for Opinions

1/ At least two opinions of this Office, concluding that Article II, Section 2 would be applicable to federal offices or positions, were located. See Ops. Atty. Gen. dated January 7, 1971 and December 12, 1960. These opinions were unreasoned and conclusory and did not distinguish between state and federal offices. To the extent inconsistent with today's opinions, these opinions will be considered as having been superseded.